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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:

ASSET RESOLUTION LLC,
BUNDY 2.5 MILLION SPE, LLC,
BUNDY FIVE MILLION SPE, LLC
CFP ANCHOR B SPE, LLC
CFP CORNMAN TOLTEC SPE, LLC
CFP GESS SPE LLC
CFP GRAMERCY SPE, LLC
FIESTA STONERIDGE, LLC
FOX HILLS SPE, LLC
HFAH MONACO SPE, LLC
HUNTSVILLE SPE LLC
LAKE HELEN PARTNERS SPE LLC
OCEAN ATLANTIC SPE LLC
SHAMROCK SPE LLC
10-90 SPE, LLC

Debtors.

- ☐ Affects All Debtors
☐ Affects Only _____

Chapter 7
(Jointly Administered under)
Case No. BK-S-09-32824-RCJ

BK-S-09-32831-RCJ
BK-S-09-32839-RCJ
BK-S-09-32843-RCJ
BK-S-09-32844-RCJ
BK-S-09-32846-RCJ
BK-S-09-32849-RCJ
BK-S-09-32851-RCJ
BK-S-09-32853-RCJ
BK-S-09-32868-RCJ
BK-S-09-32873-RCJ
BK-S-09-32875-RCJ
BK-S-09-32878-RCJ
BK-S-09-32880-RCJ
BK-S-09-32882-RCJ

**CERTAIN DIRECT LENDERS' MOTION TO
ENFORCE NUNC PRO TUNC ORDER
CONVERTING CHAPTER 11 CASES TO
CHAPTER 7 CASES REGARDING THE
DISBURSEMENT OF CERTAIN FUNDS HELD
IN TRUST**

Hearing Date: OST Pending
Hearing Time: OST Pending

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Certain Direct Lenders (“Movants”) file this Motion to Enforce Nunc Pro Tunc Order Converting Chapter 11 Cases to Chapter 7 Cases Regarding the Disbursement of Certain Funds Held in Trust, as follows:

I.

PRELIMINARY STATEMENT

The Chapter 7 Trustee has control of approximately \$10.7 million that the Court has previously ordered must be disbursed to the direct lenders. In the action styled *3685 San Fernando Lenders, LLC, et al. v. Compass USA SPE, LLC, et al.*, Case No. 2:07-cv-00892-RCJ-GWF (“892 Case”), the Court entered a Preliminary Injunction that permitted Compass USA SPE LLC (“Compass”) to collect loan payments and settlement payoffs from borrowers, but then required it to deposit certain portions of those funds in a direct lenders’ remittance account. Those funds are now held in trust by the Chapter 7 Trustee for the benefit of the direct lenders (the “Trust Funds”). The Trust Funds were not previously paid to the direct lenders because Compass wrongly claimed to be entitled to them as compensation under the parties’ Loan Servicing Agreements (“LSAs”).

However, on September 18, 2009, this Court issued its summary judgment order in the 892 Case (the “892 Order”), ruling that Compass (and thereafter Debtor Asset Resolution, LLC (“Asset Resolution”)) were: (i) not entitled to default interest or late fees under the LSAs for any loan on which the direct lenders did not first recover all their principal and accrued interest; and (ii) entitled to only one accrued annual servicing fee, which was to be calculated based on the ultimate collection amount of each loan. As a result, on January 29, 2010, in converting the above-captioned cases to cases under Chapter 7 of the Bankruptcy Code (the “Conversion Order”), this Court ordered the Chapter 7 Trustee to disburse the Trust Funds to the direct lenders in accordance with the 892 Order. Specifically, the Court stated that “the Chapter 7 Trustee shall disburse those funds that were previously being held by Asset Resolution in trust for the direct lenders in accordance with the summary judgment Order entered by the undersigned United States District Judge in the 892 Case on September 18, 2009.”¹ Unfortunately, the Chapter 7 Trustee has failed to disburse the Trust

¹ See Declaration of Rodger W. Stubbs in Support of Motion to Enforce Nunc Pro Tunc Order Converting Chapter 11 Cases to Chapter 7 Cases Regarding the Disbursement of Certain Funds Held in Trust (“Stubbs Decl.”), dated March 25, 2010, Ex. A at 4.

1 Funds to the direct lenders. Accordingly, the Court should enforce the Conversion Order and again
 2 order the Chapter 7 Trustee to immediately disburse the Trust Funds to the direct lenders.²

3 II.

4 ARGUMENT AND AUTHORITIES

5 **A. The Court's Preliminary Injunction Established The Framework For Escrowing And** 6 **Disbursing The Trust Funds.**

7 The Preliminary Injunction, which this Court entered in the 892 Case on November 6, 2007,
 8 established the framework for Compass to collect, retain, escrow, and disburse any monies that it
 9 collected from borrowers on outstanding loans. *See id.*, Ex. C, ¶¶ 4-6. In particular, for any loan in
 10 which the sums that Compass collected were less than the loan's outstanding principal balance and
 11 accrued interest, and pending this Court's subsequent resolution of the parties' entitlement thereto,
 12 the Trust Funds were to be deposited and held in trust for the direct lenders in a remittance account.
 13 *See id.*, ¶ 6. Incredibly, the direct lenders have been deprived of the Trust Funds since at least
 14 September 2007. *See* Addendum A.

15 The Preliminary Injunction expressly allowed Compass to first deduct and retain its claimed
 16 servicing fees and advances. *See id.* It then required Compass to deposit the remaining Trust Funds
 17 in the direct lenders' remittance account. *See id.* Compass did, in fact, deduct and retain its claimed
 18

19
 20
 21 ² In doing so, the Court should also specifically order the Chapter 7 Trustee to disburse to Bickel &
 22 Brewer those amounts identified on the spreadsheets attached as Exhibit B to the Stubbs Decl. for
 23 further disbursement by Bickel & Brewer to Movants. Specifically, Exhibit B identifies: (i) all the
 24 current holders of the beneficial interests in the 3685 San Fernando Partners, Anchor B, Bar USA,
 25 Bay Pompano Beach, La Hacienda, and Shamrock Tower loans, which comprise the majority of the
 26 Trust Funds; (ii) the ownership percentages of the beneficial interest holders in each of those six
 27 loans; (iii) the total monies in those six loans that are payable either to those direct lenders
 28 represented by Bickel & Brewer, or to Debt Acquisition Company of America ("DACA"); (iv) the
 proposed amounts payable to the Receiver for his fees incurred in connection with the 892 Case; and
 (v) the direct lenders, including those represented by Bickel & Brewer, who arguably owe prepaid
 interest to DACA. As to those direct lenders who may owe prepaid interest to DACA, Bickel &
 Brewer agrees that the following procedure, which will be requested by separate motion filed by
 DACA, should be employed: the Chapter 7 Trustee should retain control over the Trust Funds
 otherwise owing to Bickel & Brewer's clients and other direct lenders until (i) DACA, pursuant to
 Local Rule 9014.1, provides negative notice of its claim to be paid prepaid interest from those direct
 lenders out of the Trust Funds, and (ii) the Court resolves any objections to DACA's claim.

servicing fees and advances prior to depositing the remaining Trust Funds into the direct lenders' remittance account. *See id.*, Ex. D.³ Thus, the direct lenders' remittance account contained only the Trust Funds.⁴

B. The 892 Order Resolved The Parties' Entitlement To The Trust Funds.

In its 892 Order, the Court resolved the parties' entitlement to the Trust Funds. *See id.*, Ex. F at 12. The Court expressly determined that the loan servicer under the LSAs was not entitled to default interest or late fees unless all principal was first repaid to the direct lenders:

Section 5 of the LSAs provides for an authorization of a method of compensation for the loan servicer. Defendants do not collect default interest or late charges from the borrower in the event that the amount ultimately collected is less than the principal amount of the loan under "b" and "c" of [section 5 of the LSAs'] language. Defendants do have a right to retain the annual servicing fee under the "a" portion of [section 5 of the LSAs'] language. A loan servicer is not entitled to recover default interest and late fees directly from the direct lender.

See id. at 12.⁵ Thus, because it is undisputed that the direct lenders have not recovered all of their principal on any of the loans comprising the Trust Funds, the loan servicer under the LSAs is not

³ The summary table set forth in the attached Addendum A reflects the servicing fees and advances previously taken by Compass in the five loans comprising the majority of the Trust Funds (as of mid-August 2009). Moreover, Asset Resolution similarly deducted and retained its claimed servicing fees and advances in connection with the sale of the Anchor B Property. *See id.*, Ex. E, ¶ 38 (Pfrommer: "Asset Resolution was, and is, entitled to distribute proceeds of any sale in accordance with the provisions of paragraph 6 of the Preliminary Injunction. Among other things, Asset Resolution was entitled, under the Preliminary Injunction, to reimbursement of more than \$207,000 in servicer advances that had been made for foreclosure and other expenses related to the maintenance and insurance of the property and the foreclosure."). Of course, pursuant to the 892 Order, the direct lenders are entitled to, and reserve their right to seek, an offset for any servicing fees that Compass and Asset Resolution improperly deducted and retained as purported loan servicing compensation under the LSAs.

⁴ The direct lenders also have a claim for, and reserve their right to seek, an offset based on any funds that Compass improperly deducted and retained as purported loan servicing compensation under the LSAs prior to the Court's entry of its Preliminary Injunction and 892 Order in the 892 Case. The list of loans subject to that offset is set forth in the attached Addendum B.

⁵ Similarly, the Court determined in connection with the Gess Property, which was sold under its supervision in late August 2009, that the loan servicer under the LSAs was not entitled to any default interest or late fees because the total collection amount on the loan was less than the original principal balance. *See id.*, Ex. G at 78:6-79:22.

1 entitled to any default interest or late fees as loan servicing compensation under the LSAs. *See id.*

2 The Court also held that the loan servicer under the LSAs is a fiduciary of the direct lenders
3 as to the handling of all funds collected by the servicer on behalf of the direct lenders. *See id.* at 6
4 (“The Motion is GRANTED in part to the extent that Asset Resolution is a fiduciary to the extent of
5 its handling of funds received on account of loans from borrowers.”); *see also id.*, Ex. H at 38:2-12
6 (“THE COURT: When they actually collect a dollar . . . they are a fiduciary of that dollar. . . . It’s in
7 an escrow. They must segregate it. They can’t put it in their general fund. . . . They must account
8 for it. If they’re going to withhold from it their servicing fee, they must disclose and account.”).

9 The Court’s rulings at the summary judgment hearing held on July 6, 2009, also delineated
10 the calculation of the servicing fee to which the loan servicer is entitled under the LSAs.
11 Specifically, the Court stated:

12 THE COURT: So I think I’m ready to find and I will so find that the
13 meaning of this is that with respect to the example I have used and
14 with respect to this particular LSA . . . [y]ou collected \$1,000,000
15 without designation. You did collect \$1,000,000, and I think under A
16 you have a right to keep the one percent of the maximum principal
17 amount of the loan. . . . I think you have the right to do that. I think
18 under A it just simply says retain, and you got \$1,000,000, and you
19 have the right to retain out of it. And we don’t care whether its
20 designated interest or default interest or principal or anything else.
You’ve got the right to twelve-twelves [sic] of your annual servicing
fee. . . .

21 MR. COLLINS: . . . Is the Court saying that they get one . . . percent
22 of the twenty-six-five or one percent of eight and a half?

23 THE COURT: Of the actual collection. I had another step in that
24 finding, and that is that the property was part of the collection. The
25 value I placed on it was not the value at the time of the foreclosure
26 sale of a maximum possible (indiscernible). The value was the eight-
27 and-a-half million dollars. Since the whole transaction now is
collapsible, the whole thing has been completed, including the sale of
the property or at least a proposed sale, that the one percent is of the
eight-and-a-half million dollars. That was my ruling (indiscernible).

28 MR. COLLINS: Right. And is that your ruling today, too, your
Honor, just as far as the servicing fees?

1 THE COURT: If we have a total, complete sale, and eight-and-a-half
 2 million dollars was realized off the REO, yeah. . . . That's the ruling .
 3 . . .

4 *See id.*, Ex. H at 58:13-59:15, 105:2-106:18. In other words, the loan servicer under the LSAs is
 5 entitled to receive one accrued annual servicing fee, which is calculated by multiplying the weighted
 6 average of the servicing fee percentages specified in the LSAs for one year by the total amount
 7 ultimately collected for that loan. *See id.*⁶

8 **C. The Court Has Recognized That Asset Resolution Does Not Hold Beneficial Title To**
 9 **The Trust Funds.**

10 On January 29, 2010, when it entered the Conversion Order, the Court also recognized that
 11 the Trust Funds were not property of Asset Resolution's estate because those funds belonged to the
 12 direct lenders and, thus, the Chapter 7 Trustee needed to disburse those funds in accordance with the
 13 892 Order:

14 the Chapter 7 Trustee, as a fiduciary for the direct lenders, shall take
 15 legal, but not beneficial, title to the funds that were previously being
 16 held by Asset Resolution in trust for the direct lenders. . . . Pursuant to
 17 further order of the Court, the Chapter 7 Trustee shall disburse those
 18 funds that were previously being held by Asset Resolution in trust for
 19 the direct lenders in accordance with the summary judgment Order
 20 entered by the undersigned United States District Judge in the 892
 21 Case on September 18, 2009, and without prejudice to the rights of
 22 third parties to assert claims (such as for Prepaid Interest) at the time
 23 that an order for distribution is sought.

24 *See id.*, Ex. A at 4.

25 Indeed, the Court had previously flatly rejected the assertion by former counsel for Asset
 26 Resolution that it owned all the Trust Funds:

27 MS. WINDLER: Your Honor, this is Katherine Windler. I understand
 28 the Court's ruling. I'd simply like to again point out that there is a
 dispute as to who is entitled to those funds. And it seems to me that
 this Court cannot make such an allocation at this time, because if it is
 determined that those funds are solely and exclusively the property of

⁶ Similarly, the Court determined in connection with the Gess Property that the loan servicer under the LSAs was entitled to a servicing fee totaling only \$94,000. *See id.*, Ex. I at 3.

Asset Resolution, as a debtor in possession, and that the direct lender's claims to those funds are not appropriately asserted –

THE COURT: You could only make that claim, Ms. Windler, if you allege – if you are making an allegation of fraud on your own behalf. In other words, you could – you have already stood in this court, and many times, and the other parties have, too, and you have acknowledged that you're holding the bulk of those funds in trust. So, if you attempt to allege now, contrary to your representations to this Court, that they're not held in trust, they're owned wholly by Asset Resolution, you would be committing fraud, ma'am.

See id., Ex. J at 26:11-27:3.

III.

REQUEST FOR RELIEF

For all the foregoing reasons, Movants respectfully request that the Court enter an order authorizing the disbursement of the Trust Funds to the direct lenders, including specifically the disbursement to Bickel & Brewer of those amounts identified on Exhibit B to the Stubbs Decl. for further disbursement by Bickel & Brewer to Movants in accordance with their engagement agreement, and award Movants such other and further relief to which they are entitled.

DATED: March 26, 2010

BICKEL & BREWER

JONES VARGAS

By: /s/ Janet L. Chubb
JANET L. CHUBB, ESQ.
JASON A. ROSE, ESQ.

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ADDENDUM A

Date	Loan Name	Compass Compensation	Escrow Amount
9/14/2007	La Hacienda	\$ 761,489	\$ 81,846
12/3/2007	San Fernando	\$ 232,195	\$ 1,852,935
2/1/2008	BarUSA	\$ 385,974	\$ 3,095,174
2/12/2008	Shamrock	\$ 3,397,188	\$ 1,250,996
8/28/2008	Bay Pompano	\$ 335,270	\$ 4,384,884
		\$ 5,112,116	\$ 10,665,835

See Stubbs Decl., Ex. D.

ADDENDUM B

Date	Loan Name	Compass Compensation	Escrow Amount
2/28/2007	Gateway Stone	\$ 1,220,425	-
3/6/2007	Interstate Commerce	\$ 129,753	-
3/8/2007	Slade Development	\$ 223,845	-
3/20/2007	Standard Properties	\$ 870,096	-
4/23/2007	Wasco Investments	\$ 399,749	-
4/23/2007	Wasco Investments	\$ 1,000,000	-
7/11/2007	Clear Lake	\$ 595,040	-
		\$ 4,454,772	\$ 0

See *id.*

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CERTIFICATE OF SERVICE

1. On March 26, 2010, I served the following document(s):

**CERTAIN DIRECT LENDERS' MOTION TO ENFORCE NUNC PRO TUNC ORDER
CONVERTING CHAPTER 11 CASES TO CHAPTER 7 CASES REGARDING THE
DISBURSEMENT OF CERTAIN FUNDS HELD IN TRUST**

2. I served the above-named document(s) by the following means to the persons as listed below:

■ a. **ECF System** (attach the "Notice of Electronic Filing" or list all persons and addresses):

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☐ b. **United States mail, postage fully prepaid** (list persons and addresses):

☐ c. **Personal Service** (list persons and addresses):
I personally delivered the document(s) to the persons at these addresses:

☐ d. **By direct email (as opposed to through the ECF System)** (list persons and email addresses):

☐ e. **By fax transmission** (list persons and fax numbers):

☐ f. **By messenger:**

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 26th day of March, 2010.

Tawney Waldo

/s/ Tawney Waldo

Name

Signature

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